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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH, PETITIONER,

vs.

THE SOUTHERN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1943.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Admiralty

No. 261 of 1938

ANTON MAHNICH

v.

THE SOUTHERN STEAMSHIP CO.

OPINION

Sur Motions to Revise Findings and Award

Before KIRKPATRICK, J.:

This is an action in admiralty for indemnity under the maritime law and for maintenance and cure, brought by a seaman injured at sea in the course of his employment on the respondent's vessel, Wichita Falls. At the close of the trial the Court orally made certain fact findings, and awarded the libellant $700 on his claim for indemnity and $300 for cure and maintenance. The indemnity awarded was for pain and suffering only, all items of loss of wages and loss of earning power being disallowed.

The respondent has filed a petition for reargument, which may be treated as a motion to modify or amend the Court's findings and award. It is directed exclusively to the findings and award in respect of the claim for indemnity, and does not challenge the amount of award for maintenance and cure. The libellant has filed a motion which may be treated as a request to amend the findings by increasing the amount of the award for cure and maintenance.

I have carefully reviewed the testimony, and am now convinced that my finding that the ship was unseaworthy was erroneous, and that the libellant is not entitled to recover anything upon his claim for indemnity. I shall therefore [fol. 2] revise the findings of fact, and now find as follows:

On August 17, 1934, the libellant, then an able seaman on board the Wichita Falls, was instructed to paint the front of the pilot house, using a stage which consisted of a

board weighing about 50 or 60 pounds, rigged from both ends by ropes which ran across the top of the pilot house and were fastened aft. One of the ropes broke at the point where it passed over the edge of the pilot house, and the libellant fell to the deck and sustained an injury to his left foot.

The rope was 1¼ to 1½ inches in diameter, and, had it been sound, it would have been adequate to support the stage together with the two men and the paint pails. There was no fault in the manner in which the stage had been rigged, and the ropes were protected against chafing at the corners of the pilot house by rounded blocks of wood.

The rope had, under the directions of the mate, been cut by the boatswain from a coil of some 1500 feet stored in the Lyle Gun box, intended to be used with the Lyle life-saving apparatus. It had been stored there for slightly over two years, had been new when stored, and had never been used for any purpose. Two lengths of 50 feet were taken from it. The portion thus selected, was, in spite of the examination of it by the boatswain and mate, unquestionably rotten or defective at the point at which it broke. There is no evidence that any of the 1400 feet which remained in the box was bad. In fact the libellant's own testimony was that the length which broke "looked pretty good, almost new; it was a little bit yellow, but the rope was looking good except that part which was stored up." (The word "stored" is a stenographic error. The word used was "tore.") Also, there was other rope on board—a coil of ¾ inch and another [fol. 3] of 2¾ inch rope, the latter being the rope usually used for rigging scaffolds, etc., and being brand new.

Thus the case comes squarely within the rule stated by the Supreme Court in the Pinar del Rio case, 277 U. S. 151; "The record does not support the suggestion that the 'Pinar del Rio' was unseaworthy. The mate selected bad rope when good ones were available." See also the Birkenhead, 51 F. (2d) 116, decided by this Court.

The basis of a seaman's claim for indemnity under the maritime law in a case like this is the unseaworthiness of the ship. The ship will not be presumed to be unseaworthy and the burden is upon him to prove it. He does not meet this burden merely by showing that an instrumentality furnished him was defective, where it also appears that such instrumentality was selected by a ship's officer or another

seaman from a large quantity not shown to be in any way defective or unsuitable.

In the present case the libellant's injury may be traced to the negligence of the mate and boatswain, who, having selected a portion of rope and having failed to observe that it had a rotten spot, furnished it to the plaintiff as part of the equipment for his work

I therefore, now make the finding that the Wichita Falls was not unseaworthy and conclude as a matter of law that the libellant is not entitled to recover anything for indemnity.

The libellant is not entitled to any increase in the award for cure and maintenance. In fact, it might easily have been less, but I understand that the respondent does not challenge it except on the ground of laches.

On the question of laches, I find that the libellant's delay [fol. 4] in bringing this action was excusable, and that it has not been seriously prejudicial to the respondent. All the witnesses to the accident were available and called, the circumstances are really undisputed, and, since the award for cure and maintenance is solely for the period from June 1938 to July 1940, I do not believe that anything is lost by not having the testimony of the physicians who took care of the libellant shortly after his injury. The real question is what was his condition as of 1938-40, and what is his condition now.

The facts relevant to maintenance and cure are as follows: The libellant left the ship on September 4, 1934, at the end of the voyage on which he was injured. He was disabled and received medical attention from that time until December, when he went back upon the ship as an able bodied seaman. For this period of disability his employer has already paid him full wages and an additional $15 for medical expenses, so that it need be given no further consideration.

From December 1935 until May 1936 he continued in the employ of the respondent, as an able seaman, his wages being gradually increased from the $52 he was earning at the time of his injury to $62.50. The work that he did was not the full work of an able bodied seaman, but did involve a large number of duties about the ship which made him a great deal more than a mere pensioner on board.

In May 1936 he voluntarily left the respondent's employment to take a job as a painter for the American Engineering Company at $24 per week.

When he left he was given to understand that he had a [fol. 5] good prospect of reemployment with the line whenever he should apply. Of course he did not wish to jeopardize his chance of a job, and that was the reason he did not bring this action earlier. Considering his situation it seems a good enough excuse to avoid the strict application of the statute of limitations as a basis for the defense of laches.

He held his job with the Engineering Company for about two years. His foot gave him some trouble, but apparently did not substantially interfere with his carrying on his work or impair his earning power, and his leaving was not attributable to the injury. He then went back to the respondent and asked for employment, but found that there was nothing for him.

He was unemployed from June 1938 to July 1940. During this time he made a number of visits to his own physician for medical treatment. In July 1940 he took his present employment as night watchman at $23.50 a week. He has kept it ever since. Obviously his foot, while it may and no doubt does give him some pain and inconvenience, does not interfere seriously with performing his work, since he makes a tour of the plant every half hour, walking about half a mile on each occasion and covering over 182 steps, up and down, in the course of each tour.

The injury produced a certain abnormality in the structure of the bones of his foot. This abnormality is permanent and has been permanent for several years. No doctor has ventured the opinion that his foot can be restored to normal. One thought that diathermy was "worth trying", and it is agreed that the pain and inconvenience from which he suffers at times can be relieved by treatment.

[fol. 6] Upon the foregoing state of facts and having in mind the decision of the Circuit Court of Appeals of this Circuit in the case of Frank B. Loverich v. Warner Company (March 17, 1941), together with the statement of the Supreme Court of the United States in Calmar Steamship Corporation v. Taylor, 303 U. S. 525, that if a disease proves to be incurable, there is no basis for extending cure and maintenance beyond a fair time after the voyage as may be expected to effect such improvement as is possible, I think that the award of $300 for cure and maintenance is ample,

and conclude as a matter of law that the libellant is not entitled to have it increased.

A decree may be submitted.

If separate findings and conclusions are desired, requests may be presented in accordance with this opinion.

[fol. 7] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7928

ANTON MAHNICH, Appellant,

vs.

THE SOUTHERN STEAMSHIP COMPANY

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed July 14, 1942

Before BIGGS, MARIS and GOODRICH, Circuit Judges

Per CURIAM:

The decree of the court below is affirmed upon the opinion of Judge Kirkpatrick.

[File endorsement omitted.]

[fol. 8] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 7928

ANTON MAHNICH, Appellant

v.

THE SOUTHERN STEAMSHIP COMPANY

On Appeal from the Decree of the District Court of the United States for the Eastern District of Pennsylvania

OPINION UPON REHEARING—Filed May 5, 1943

Before Biggs, Maris and Goodrich, Circuit Judges

GOODRICH, Circuit Judge:

The libellant brought an action in admiralty under the general maritime law to recover for indemnity by reason of injuries sustained by an alleged unseaworthy appliance

and for cure and maintenance. We are not presently concerned with the latter cause of action.[1] The injuries com- [fol. 9] plained of were received while libellant was engaged in a painting job upon the ship of which he was a member of the crew. The injuries were received when the rope supporting the stage upon which he was working broke throwing him to the deck below. The rope had been selected for use by the mate of the ship. It was taken from the Lyle gun box and had not theretofore been used. It may be assumed, for the purpose of discussion here, that the failure to detect the weakness of the rope was negligence on the part of the officer who selected it for the purpose used.

The libellant's claim would obviously be an appropriat one for redress under the provisions of the Jones Act[2] were it not for the fact, as his counsel concedes, that the action was begun too late. His claim for recovery, therefore, rests upon the maritime law and the basis for the claim is alleged unseaworthiness (The Osceola, 189 U. S. 159 (1903)) of the vessel because the rope was defective. There was, however, an ample supply of good rope on board the ship at the time of the acts complained.

The respondent contends that the decision in Plamals v. S.S. "Pinar Del Rio," 277 U. S. 151 (1928) settles the question of the libellant's claim adversely to the latter. That case also involved an injury to a seaman which was sustained while he was engaged in working on a paint job. The rope broke, the injured man was hurt when he fell to the deck. There, too, the accident occurred when the mate selected a bad rope and an abundant supply of good rope was on board. The greater part of the discussion by the Supreme Court concerns the question whether in a suit under the Jones Act a libel in rem could be had and this the Supreme Court decided in the negative. The Court also, however, stated that the record did not support the suggestion that the "Pinar Del Rio" was unseaworthy. "The mate selected a bad rope when good ones were available." (p. 155) The libellant says that this was only dictum by [fol. 10] Mr. Justice McReynolds who wrote the opinion of the Court. We think it cannot be so lightly dismissed.

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[1] There has been no request for reargument upon this phase of the case.

[2] 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1940).

The claim that recovery could be had under the general maritime law for injury sustained for lack of seaworthiness of the vessel was fully presented by the appellant in his brief in the Supreme Court, as an inspection of that brief will show. It also appears in the summary of his argument given in the official report of the decision of the Supreme Court (277 U. S. 151, 153). While the opinion, it is true, does not discuss the matter at length we do not think that the authority of the case as a decision on this point can be disregarded by us because the Court, through the writer of the opinion, chose to dispose of the matter in three lines instead of three hundred.

The libellant urges also that this portion of the "Pinar Del Rio" decision is no longer authority after the opinion of the majority of the Court in Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 (1939). The sole question in that case, however, was whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance on the ship instead of a known safe method of doing his work. All of the discussion in the opinion by Mr. Justice Stone is directed to this point. The decision was one under the Jones Act. We do not, as we read the opinion, find even a dictum to support the position of the libellant here.

Our conclusion is, therefore, that this Court was right in its affirmance of the decree of the Court below upon the first hearing. 129 F. (2d) 857 (1942). We have no disposition to narrow the basis of recovery under the maritime law for injuries sustained by the seaman while in the service of the ship. See Jones v. Waterman S.S. Corporation, 130 F. (2d) 797 (C. C. A. 3, 1942), affirmed by the Supreme Court on April 19, 1943, — U. S. —. However, the "Pinar Del Rio" decision seems to be squarely on the point and it is our duty to follow it.

The decree of the District Court is affirmed.

[fol. 11] DISSENTING OPINION

Biggs, Circuit Judge, dissenting:

In the instant case the first officer of the S.S. Wichita Falls caused two pieces of rope to be cut from a 1500 foot length of rope which was in the Lyle-gun box on board the ship

and used them to hang a stage to the bridge of the vessel. The appellant was ordered to get on the stage so that he might scrape and paint the bridge. He had no sooner gotten on the stage when one of the ropes broke, causing him to fall a distance of fifteen feet to the deck. He was injured and brought this suit under the general maritime law (not under the Jones Act) to recover damages.

The conclusion reached by the majority opinion is based upon the words used by Mr. Justice McReynolds in the opinion of the Supreme Court in Plamals v. Pinar Del Rio, 277 U. S. 151, 155, "The mate selected a bad rope when good ones were available."

In Plamals v. Pinar Del Rio, Plamals was being hoisted up the smoke stack of the vessel in a boatswain's chair. A rope broke supporting the chair and he fell to the deck and was injured. The mate of the Pinar Del Rio had selected rope which was visibly old and worn.

There has been much argument in the case at bar as to the nature of the suit which Plamals brought. Actually he set forth two causes of action in his libel; one was based on the general maritime law for indemnity; the other, on the Jones Act. As I have indicated, Plamals' suit was an action *in rem* against the vessel. Mr. Justice Reynolds stated, pp. 154-155, that the "* * * libel alleged that * * * [Plamals] injuries 'were due to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn and not suitable for use' * * * The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." He went on to say, "We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke [fol. 12] of it as based upon that section. The evidence would not support a recovery upon any other ground." The Supreme Court held that Plamals, at his election, was entitled to assert his rights under the general maritime law or under the Jones Act; that it would treat Plamals' libel as asserting his rights under the Jones Act, since he had not stated a good cause of action under the general maritime law, and that a seaman's rights under the Jones Act could not be enforced by a suit *in rem*.

There is a material difference between the facts of the Plamals case and those of the case at bar. In the Plamals

case the mate negligently selected old and worn rope. In the case at bar the first officer carefully inspected the rope used and found it to be in good condition.[1] In the case at bar the duty of the shipowner to supply its ships with good rope and proper appliances was delegated by it to the ship's officers. The respondent's marine superintendent testified that "* * * we always give the officers in charge what they order, so it is reasonable to think that they had the full supply [of rope]."[2] The superintendent did not testify that the S.S. Wichita Falls possessed an adequate supply of good rope. It is settled that the shipowner has an absolute duty to provide safe appliances for the ship for the voyage. In Sabine Towing Company v. Brennan, 72 F. (2nd) 490, 494 cert. den. 293 U. S. 611; The Portland, 213 F. 639; The H. A. Scandrett, 87 F. (2nd) 708. These cases, which represent the great weight of authority, follow the law as laid down by the Supreme Court in The Osceola, 189 U. S. 158, Mr. Justice Brown stated in that case, p. 175, [fol. 13] "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

The S.S. Wichita Falls was engaged in the intercoastal trade and was bound for Houston, Texas, from Philadelphia at the time of the accident. The rope had been in the Lyle gun box for about two years. See note 1 supra. The ship could and presumably did make many such short voyages while the decayed rope remained in the Lyle gun box and

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[1] The first officer testified, "I personally examined the rope—me and the boatswain. We examined the rope; went right through, and we did not see any place where it was bad or showed that it was rotten. By examining, we just twisted it right along." He was asked the question, "That is you turned it counter wise to the way is was twisted?" The first officer answered, "Yes,—right in the middle if you see it hard or dusty, it is rotten. We did not see that." R. p. 221. Nick Geletic, the member of the crew who cut the lengths from the Lyle gun rope at the first officer's direction, stated that the latter said to him, "I see that new line." R. p. 212. As a matter of fact, the rope had been in the Lyle gun box for about two years. R. p. 228.

[2] R. p. 174.

the shipowner had many opportunities to replenish it with sound rope. This, the shipowner failed to do. I think that the first officer had the right to assume that the rope in the Lyle-gun box was sound, for if there be a place where it may be presumed that sound rope will be found, it is in a life-saving device. Moreover, as I have stated, the first officer carefully examined the rope before using it. As a matter of fact, there is evidence that, whatever the first officer's subsequent knowledge may have been, he thought at the time the rope was used that it was new. See the testimony of Geletic, note 1 supra. I think that the first officer was not negligent. If I am correct in this, it follows that there was no negligence on the part of a ship's officer to insulate the shipowner from its absolute duty to maintain safe appliances as in the Plamals case.

My dissent, however, is based on other grounds as well. The decision of the majority of the court in effect holds that the Supreme Court by Mr. Justice McReynolds' single sentence upset the then existing rule of maritime law, a rule which consistently had given effect to the status of seamen as wards of the admiralty. But even if the majority is right in its conclusion as to the Plamals case, I think the effect of that decision has been mitigated by the decision of the Supreme Court in Socony-Vacuum Co. v. Smith, 305 U. S. 424. The cited case arose under the Jones Act case but the defense asserted was assumption of risk by an oiler [fol. 14] who had been injured because he had chosen to stand on a defective step in his ship's engine room when he could have performed his duties in safety from the floor. In passing upon this defense, which in nature is substantially similar to that asserted in the case at bar, the Supreme Court took occasion to pass on the general maritime law and consider defenses under that law as they existed before the passage of the Jones Act. The Supreme Court reiterated the doctrine of the absolute liability of the shipowner to furnish safe appliances.[3] Mr. Justice Stone stated, id., pp. 428-429, "Before the Jones Act a seaman was entitled to recover from a vessel or its owner, indemnity for

[3] The majority of this court do not contend that the Jones Act obliterated the rights of seamen under the general maritime law as it existed at the time of the passage of the Jones Act. Indeed, we held the contrary in Brown v. C. D. Mallory & Co., 122 F. (2nd) 98.

injuries due to an unseaworthy vessel, or for failure to supply and to keep in order proper appliances appurtenant to the ship. The Osceola * * *." It is pertinent to observe that Mr. Justice McReynolds dissented on the ground that assumption of risk was a defense and did not go merely to mitigation of damages.

I conclude that Plamals v. Piñar Del Rio can no longer be considered to be the governing law, if it was ever such, on the point sub judice and for this reason also I think that the judgment should be reversed and the libellant awarded damages.

Indeed, to hold otherwise leaves the seaman in an unenviable position. He is guilty of mutiny if he refuses at the lawful command of his officer to go upon a stage already rigged for him. If he obeys his officer and is thrown to the deck through no fault of his own, he may break his neck for nothing. I think that the anomaly is increased by reason of the fact that if an accident occurs because a plank in a stage breaks and a seaman is injured, he may recover indemnity. It has not been suggested that a shipowner would be relieved of its absolute liability because an officer selected rotten planking for a stage when sound [fol. 15] boards were available. Indeed, the law looks the other way. See Benedict on Admiralty, Sixth Edition, Sec. 83, and the authorities there cited.

A true Copy:

Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 16] Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.